GERARD & OSUCH, LLP
Robert B. Gerard, Esq. (Nev. State Bar #005323)
Lawrence T. Osuch, Esq. (Nev. State Bar #006771)
2840 South Jones Boulevard
Building D, Unit 4
Las Vegas, Nevada 89146
Telephone: (702) 251-0093
Facsimile: (702) 251-0094

BLUMENTHAL & NORDREHAUG
Norman B. Blumenthal (State Bar #068687)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858) 551-1223
Fax: (858) 551-1232

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE CORPORATION; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive, Defendants.	Case No. 2:07-CV-00682- PMP-LRL **OBJECTION TO EXHIBIT "A" SUBMITTED BY DEFENDANT MENU FOODS** JUDGE: Hon. Philip M. Pro

Plaintiff Margaret Picus objects to Exhibit "A" submitted by Defendant Menu Foods in connection with the motion to dismiss under Rule 12 as follows:

1. Authenticity

The document attached as Exhibit "A" is not authenticated and therefore is not admissible under Fed. R. Evid., Rule 901.

Dockets.Justia.com

2. Relevancy

Defendant Menu Foods submits Exhibit "A" to purportedly establish as a matter of fact that Menu Foods retained no benefit from their alleged wrongdoing because they have recalled the product and paid refunds. This exhibit is irrelevant for multiple reasons and is therefore inadmissible under Fed. R. Evid., Rule 402. First, Defendant's purported recall has nothing to do with the claims of the Class. Defendant's recall notice directed consumers to return certain contaminated lots to receive a refund of the purchase price because certain of the mislabeled lots were contaminated. The package where the product was not only mislabeled but also contaminated and injurious was but one of Plaintiff's many mislabeled products purchased by Plaintiff from Defendants. **The Class in this case as represented by Plaintiff is far broader than the few consumers affected by adulteration of a few lots and the benefit retained is not confined to the adulterated lots.** Here the Class is composed of all consumers who during the Class Period purchased products from Defendants that were falsely and fraudulently mislabeled as "Made in the U.S.A."

3. Exhibit "A" Is Hearsay and Cannot Be Used in a Rule 12 Motion to Dismiss

Exhibit "A" purports to be extrinsic evidence on a disputed issue of fact is simply never proper on a motion to dismiss under Rule 12. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). The evidence is not a matter which is subject to judicial notice.[1] Fed. R. Evid. §201. The evidence is undeniable hearsay as to the disputed issue of whether the benefit was retained by Defendants. Fed. R. Evid. § 801 and § 802. The evidence is being used to contest the allegations of the pleading, which are assumed to be correct on a motion to dismiss. The Complaint, at paragraphs 46 and 47, plainly alleges that Defendants retained the improper benefit. This important factual issue cannot be resolved by reference to a single hearsay piece of evidence during a motion to dismiss. *Simpson, supra*, 452 F.3d at 1046. Plaintiff strongly disputes the document as evidence that no benefit was retained by the Defendant from the misrepresentation of geographic origin, and as such, the Court

[1] None of the authorities cited by Del Monte support the consideration of this document. In every one of the authorities cited, the document considered by the Court was a **contract or agreement** referenced in the pleadings upon which the claim was based, not a disputed issue of fact concerning the defendant's conduct. Here, the recall is not "central" to Plaintiff's claim, rather, what is central is Defendants' misrepresentation concerning the geographic origin of the products, which fraud was admitted in the recall.

may not consider the document as evidence on this disputed factual issue. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Erickson v. Horing*, 2000 U.S. Dist. Lexis 22432, *30 (D. Minn 2000).

For all of these reasons, Plaintiff respectfully submits that the Court should not consider Exhibit "A" for the purposes argued by Defendant Menu Foods, and if the Court were to consider any extrinsic evidence or documents, Plaintiff has a right to discovery and must be allowed discovery to rebut and respond to this factual issue.

Dated: July 12 , 2007

GERARD & OSUCH, LLP

By: /s/ Robert B. Gerard

Robert B. Gerard, Esq
Nevada State Bar #005323
Lawrence T. Osuch, Esq.
Nevada State Bar #006771
2840 South Jones Boulevard
Building D, Unit 4
Las Vegas, Nevada 89101
Telephone: (702) 251-0093
Facsimile: (702) 251-0094

Norman Blumenthal, Esq.
California State Bar #068687
Blumenthal & Nordrehaug
2255 Calle Clara
La Jolla, California 92037
Telephone: (858) 551-1223
Facsimile: (858) 551-1232

Attorneys For The Plaintiffs